BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.

Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.

Rulemaking 95-04-043 (Filed April 26, 1995)

Investigation 95-04-044 (Filed April 26, 1995) (90-Day Phase)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION FOR IMMEDIATE PREHEARING CONFERENCE REGARDING ENTERPRISE LOCAL SWITCHING ISSUES

This ruling is issued denying the motion filed on December 24, 2003, by CalTel seeking an immediate prehearing conference (PHC) in the "90-Day Phase" of this proceeding to establish procedures to apply to a multi-party consolidated Section 252 process limited solely to the issue of renegotiation of interconnection agreements relating to enterprise local switching (ELS) transition issues. Specifically, the ELS issues relate to the process whereby SBC California (SBC) and Verizon will continue to offer ELS once current ELS unbundled network elements (UNEs) are terminated pursuant to the Triennial Review Order (TRO), and the terms and conditions of the transition of existing end users served by SBC's ELS UNE to other facilities, if necessary. CalTel files the motion on behalf of a group of competitive local exchange carriers (CLECs or "Participating Carriers") that have authorized CalTel to represent their interests

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with respect to ELS transition issues in this proceeding. CalTel's motion pertains only to SBC.

Positions of Parties

Although the gap between the positions of the Participating Carriers (represented by CalTel) and SBC has substantially narrowed since the beginning of this proceeding, CalTel nonetheless asks for an immediate PHC in order for the Commission to assist in the closure of the remaining gap and to facilitate negotiations and arbitration, if necessary, regarding ELS issues. SBC and CalTel now agree that amendments to interconnection agreements intended to implement the FCC's new enterprise switching rules should be negotiated consistent with Section 252 of the 1996 Act (47 U.S.C. § 252) and with the parties' respective change of law provisions. In response to Participating Carriers' concerns, SBC has agreed to negotiate and arbitrate contractual issues on a consolidated basis to the extent that the CLECs have overlapping interests or common contractual language.

Parties' remaining dispute concerns the scope of the current contract negotiations and the need for an immediate PHC to facilitate expedited conclusion of negotiations or arbitration, if necessary. CalTel seeks to limit current negotiations to ELS issues, while deferring other *Triennial Review Order* issues for subsequent negotiations. With this limited scope of arbitration, the Participating Carriers propose a schedule not to exceed six months. CalTel argues that Participating Carriers are concerned that service to end users could be jeopardized during the pendency of contractual negotiation and arbitration without expedited resolution.

SBC filed a response in opposition to the CalTel Motion on January 5, 2004. SBC argues that CalTel's Motion seeking a PHC or a Commission moderated

workshop is premature and should be denied. SBC believes that the Participating Carriers should negotiate the *TRO* issues as requested by either party in a single process pursuant to the binding change of law provisions in their interconnection agreements. SBC asks the Commission to permit the voluntary negotiation process to proceed under the terms of Section 252, and the relevant change of law provisions, by directing parties to abide by those terms and the provisions of the TRO with respect to transition. While not objecting to the Commission monitoring, SBC believes the negotiations should be allowed to run their normal course.

Disposition of Issues Raised in the Motion

Need For Immediate Prehearing Conference

CalTel has not justified the need for an immediate PHC at this point in the negotiation process. Although CalTel has raised the concern of potential customer service interruptions without quick resolution of ELS issues, there is no basis to conclude that Participating Carriers will be impaired in their ability to serve customers due to the time required to conclude contract negotiations or arbitration with SBC.

SBC has given its commitment that it will not terminate its provision of service to any of the carriers that CalTel purports to represent during the relevant transition period due to the pendency of negotiations or dispute resolution related to the TRO. SBC affirms that it is currently providing only 76 switch ports for DS1 or higher capacity loops (only two of which are currently purchased by the CalTel CLECs). SBC states that these carriers can continue to use unbundled switching for their enterprise circuits until their interconnection agreement amendments are negotiated, as contemplated by the TRO (see paragraphs 532, 700-706). Thus, Participating Carriers and their end users are

not at risk of losing service while contract negotiations or arbitration is pending since they will continue to have access to existing ELS arrangements until new interconnection arrangements are implemented. Thus, there is no immediate necessity to convene a PHC at this time for the Commission to intervene in the ELS negotiation process in order to avoid customer disruptions or competitive harm.

The TRO provides that CLECs serving ELS customers have 90 days from the end of the 90-day state review period to transfer their embedded base, "unless a longer period is necessary to comply with a 'change of law' provision in an applicable interconnection agreement." (*TRO* at ¶ 532.) The FCC set forth in the *TRO* how parties must resolve any contractual issues arising under its decision. (*TRO* at ¶¶ 700-706.) ("Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and 252;" *Id.* at 701). The FCC "decline[d] to depart from the section 252 process;" *Id.* at 702), and any change of law provisions in the interconnection agreements. Thus, it is consistent with the TRO to permit negotiations to proceed without Commission intervention with a PHC at this point.

Moreover, SBC indicates that it sent a letter on October 30, 2003, to each carrier with whom SBC California has an interconnection agreement, inviting them to negotiate amendments pursuant to their contractual change of law provisions, to conform the interconnection agreements with the *TRO*. Because different interconnection agreements provide for different time periods in which to negotiate amendments, SBC California proposed that each carrier begin formal negotiations on a particular date such that the contractual change of law "negotiation window" for *all* carriers would end on or about March 12, 2004. Based on the timing of this approach, should the parties be unable to reach

agreement on any issues, SBC agrees that carriers could jointly petition the Commission to arbitrate any remaining disputes beginning on the same date (March 12, 2004), and the Commission could then conduct a multi-party, consolidated arbitration.

SBC's proposed date of March 12, 2004, as explained above, provides a reasonable check point regarding the progress of negotiations. If the parties are unable to reach agreement on contract issues by March 12, 2004, parties may jointly petition the Commission to arbitrate any remaining disputes as of March 12, 2004. The Commission may then convene a PHC to arrange for a multi-party, consolidated arbitration.

Additional Measures to Facilitate Contract Negotiations

Although no PHC is warranted at this time, additional guidance is provided on certain issues raised in the motion and reply that appear to be impeding progress in negotiations, as discussed below.

Confirmation of CalTel Authorization as Contracting Agent for CLECs

One issue raised by SBC as impeding progress in negotiations is the fact that Participating Carriers have not responded to SBC's requests for confirmation of CalTel's authorization to negotiate on carriers' behalves. In response to the requests from CalTel to negotiate terms and conditions regarding ELS issues, SBC responded that it would be "willing to negotiate with CalTel as the representative of one or more carriers, provided that those carriers confirm that CalTel is actually authorized to negotiate as their representative and that the carriers agree to be bound by any resulting agreements (e.g., via a letter of

authorization)."¹ SBC contacted the individual carriers that CalTel claims to represent, asking those carriers to provide such a letter of authorization.

SBC indicates, however, that CalTel members have yet to provide letters, and have provided conflicting information about who will ultimately be representing them on these issues. SBC argues that failure by CalTel members to clearly designate their authorized representatives will create delay and confusion in the negotiations, and could cause duplicative efforts to resolve issues.

SBC argues that CalTel cannot "negotiate" on behalf of a carrier in order to extract concessions while the purportedly represented CLEC remains free to disclaim any reciprocal concessions made by CalTel in the negotiations. If CalTel is to negotiate on behalf of any carriers, SBC argues, those carriers need to provide proof that CalTel is authorized to negotiate on their behalves and to bind them to the results of the negotiations. SBC contends that before any PHC and moderated workshop is scheduled, at a minimum, letters of authorization should be provided to SBC to confirm CalTel's negotiating authority.

In the interests of facilitating progress in negotiations, CalTel is directed to promptly provide the requested letters of authorization to SBC confirming its authority to negotiate on behalf of each of the Participating Carriers.

Scope of Issues Subject to Current Contract Renegotiations

Another dispute that appears to be impeding progress concerns parties' differences as to the proper scope of issues to be negotiated at this time. CalTel believes that ELS issues should be negotiated separately apart from other *TRO*-related issues identified by the parties, arguing that inclusion of the latter

 $^{^{1}\,}$ SBC Status Report of Nov. 7, 2003, at 3.

would delay the negotiation process. CalTel argues that resolution of issues other than ELS cannot reasonably be expected until late 2004 if there are no delays or further complications, and that in the meanwhile, the Participating Carriers would be "forced into a state of limbo" absent separate resolution of the ELS issue.

SBC denies that the CalTel CLECs will be harmed by negotiating *TRO*-related issues in a single process. Pursuant to the negotiation procedures established by Section 252 of the 1996 Act and the contractual change of law provisions in the CalTel CLECs' interconnection agreements, SBC argues that there is no basis for applying different time limits to different negotiation issues.

SBC also disputes the contention that negotiation of other *TRO*-related issues must await the Commission's determinations in the nine-month proceeding. Many of the other *TRO*-related issues that SBC seeks to negotiate have nothing to do with the nine-month proceedings (e.g., amendments reflecting changes of law with respect to the implementation of line sharing grandfathering, qualifying service conditions, eligibility criteria, and the redefinition of certain network elements.) (See CalTel Motion, Attachment A at 2.)

Even with respect to network elements that are the subject of the nine-month proceedings, SBC argues that negotiations need not be delayed until the Commission resolves those proceedings. SBC believes that interconnection agreement language reflecting the FCC's new unbundling requirements can still be negotiated now to address, for instance, the terms and conditions governing access to high capacity loops and transport for those customer locations/routes where SBC will and will not be required to provide unbundled access. The list of particular locations/routes where the Commission may eventually find non-

impairment is not a necessary prerequisite to the negotiation of the terms and conditions governing access to the loops/transport whether or not they are on that list. The same holds true with respect to mass market switching and to the scope of shared transport.

It is concluded that CalTel has failed to establish a basis for limiting contract negotiations only to ELS issues on a separate time track from all other issues. Consistent with the Act, and in the interests of fairness, practicality, and efficiency, all TRO-related issues should be addressed in a single negotiation process, rather than piecemeal. Pursuant to the *TRO*, carriers are to use the Section 252 negotiation process (supplemented or replaced where applicable by any contractual change of law provisions) to establish interconnection agreement amendments implementing the new requirements of the TRO. (See TRO, ¶¶ 700-706.) Section 251(c) of the 1996 Act requires all carriers to "negotiate in good faith the terms and conditions" of interconnection agreements. Section 252(a) similarly provides for the voluntary negotiation of such agreements. As noted by SBC, neither Section provides for a carrier's refusal to negotiate less than the open Section 251/252 issues identified by either party under the Act. Section 252(b)(1) provides that within the arbitration window, any party can "petition a State commission to arbitrate any open issues" remaining after Section 251/252 negotiations have occurred. Thus, a carrier may not prevent a contract issue from proceeding to arbitration by simply refusing (or delaying) negotiation of the issue.

SBC argues that Participating Carriers will not be "forced into a state of limbo" or "have to 'stand still' for a year" (CalTel Motion at 4) merely because the negotiations are expanded to include all *TRO*-related issues requested be negotiated by either party. In any event, to the extent that any of the

Participating Carriers still believe that any particular provision of the contract cannot reasonably be negotiated without knowledge of what findings the Commission will make in the nine-month proceeding, they may identify those specific issues for potential arbitration as part of the March 12, 2004 petition process outlined above. In any event, the pendency of the nine-month proceeding should not be used as a reason for a blanket refusal to negotiate anything other than ELS issues.

Moreover, as SBC observes, once CalTel establishes itself as the authorized negotiating party, it is entitled to seek arbitration of these issues as provided under Section 252. Specifically, during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues arising under the Act. Thus, CalTel has recourse to ensure that the issues raised and unresolved within the negotiation process under the Act will be presented to this Commission for resolution.

The TRO states that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252." (TRO, ¶ 701.) The FCC did not hold that one party could demand negotiation of some issues but then refuse the other party's request to simultaneously negotiate other issues. Rather, the FCC stated that "[o]nce a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately." (TRO, ¶ 704 (emphasis added).) The FCC also noted that "any refusal to negotiate or cooperate with the contractual dispute resolution process, including taking actions that unreasonably delay

these processes, could be considered a failure to negotiate in good faith and a violation of section 251(c)(1)." (*Id.*) In particular, the FCC held:

[P]arties may not refuse to negotiate any subset of the rules we adopt herein. Once the rules established herein are effective, and any applicable change of law process has been triggered, a party's refusal to negotiate (or actions that would otherwise delay unnecessarily the resolution of) any single issue may be deemed a violation of section 251(c)(1). (*Id.*, 706.)

In view of the above discussion, parties are directed to proceed with negotiation of *all* interconnection agreement modifications requested by either party necessary to implement changes of law with respect to affected provisions requested by either party.

IT IS RULED that:

- 1. The motion of Cal-Tel is denied seeking an immediate prehearing conference (PHC) for the Commission to intervene in contract negotiations on enterprise local switching (ELS) related amendments is denied.
- 2. If the parties are unable to reach agreement on contract issues by March 12, 2004, parties may jointly petition the Commission to arbitrate any remaining disputes as of March 12, 2004. The Commission may then convene a PHC to arrange for a multi-party, consolidated arbitration as deemed warranted at that time.
- 3. As a preliminary requirement in furthering progress toward contract negotiation, each of the Participating Carriers that has not yet done so is hereby directed to provide written confirmation to SBC as to whether CalTel is actually authorized to negotiate as its representative and that the carrier agrees to be bound by any resulting agreements.

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4. Contract negotiations between the Participating Carriers and SBC California should proceed by addressing all Triennial Review Order issues in a single negotiation process rather than in a piecemeal fashion with ELS issues singled out for separate consideration. To the extent any Participating Carrier believes that certain specific contract terms require Commission findings in the nine-month proceeding in order to conclude negotiations, they may identify those specific terms as disputed elements subject to arbitration in the March 12, 2004 petition process, as outlined above.

Dated January 16, 2004, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion for Immediate Prehearing Conference Regarding Enterprise Local Switching Issues on all parties of record in this proceeding or their attorneys of record.

Dated January 16, 2004, at San Francisco, California.

/s/ JANET V. ALVIAR
Janet V. Alviar

NOTICE

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.